Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States
October Term, 2000

MARIE BURNETTE and RALPH BURNETTE,
Petitioners,

v.

LESLIE CAROTHERS, ENVIRONMENTAL PROTECTION DEPARTMENT OF CONNECTICUT, ARTHUR J. ROCQUE, JR., Commissioner Environmental Protection, LOWELL P. WEICKER, JR., Governor, BRUCE L. MORRIS, CT Dept. of Public Works, LARRY MEACHUM, Commissioner Official Capacity, CT Dept. of Correction, STATE OF CONNECTICUT, JOHN G. ROWLAND, Governor, THEODORE R. ANSON, Commissioner, JOHN J. ARMSTRONG, Commissioner,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Does a Citizen Suit under the Federal Water Pollution Control Act, Resource Conservation Recovery Act and the Comprehensive Environmental Response Compensation Liability Act puncture a State's sovereign immunity when a citizen-plaintiff seeks declaratory and injunctive relief and the real party in interest is the United States of America?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, BRIAN BURNETTE, A Minor by his parents and next friends, Ralph & Marie Burnette, RALPH G. BURNETTE, III, DAVID J. ATTARDO, JOAN F. ATTARDO, JOHN J. BATISTE, MIMA A. BATISTE, MARK BATISTE, By his parents and next friends John J Batiste and Mima A. Batiste, TYRON BATISTE, A Minor by his parents and next friends John J. Batiste and Mima A. Batiste, CAROL A BEERWORT, LAWRENCE BEERWORT, DONALD M. CARAVELLA, DONNA L. CARAVELLA, LILLIAN E. CARDALICO, GARY A. CARRA, MARGARET CARRA, RAYMOND I. COLTON, BARBARA DONNELLY, JOANNE DONNELLY, PHILIP B. DONNELLY MARIE COLTON, JAMES R. FAUST, MARILYN FAUST, ERICA L. HARE, By her parents & next friends Wayne R. Hare & Marilyn C. Hare, JENNIFER L. HARE, A Minor by her parents and next friend Wayne R. and Marilyn C. Hare, MICHAEL R. HARE, A Minor by his parents and next friend Wayne and Marilyn Hare, MARILYN C. HARE, WAYNE R. HARE, LYNN ISSA, ROBERT G. ISSA, KIMBERLY R. KEESEE, ORVILLE W. KEESEE, CATHERINE F. KELLY, JAMES J. KELLYNICHOLAS J. KELLY, A Minor by his parents & next friends Catherine & James J. Kelly, NOREEN E. KELLY, JOSEPHINE C. KLUESNER, RICHARD J. KLUESNER, JASON KULAS, A Minor by his parents & next friends Kerry Kulas & William J. Kulas, KEVIN KULAS, A minor by his parents & next friend Kerry Kulas & William J. Kulas, KERRY KULAS, WILLIAM J. KULAS, KENNETH E. LORDI, JOSEPH MARINACCIO, A minor, by his parents and next friends Michael D. Marinaccio and Susan Marinaccio, MICHAEL J. MARINACCIO, A Minor, by

his parents and next friends Michael D. Marinaccio & Susan Marinaccio, MICHAEL D. MARINACCIO, SUSAN MARINACCIO, ANTONIO MAURO, DORIS L. MAURO, JAMES MAURO, A minor, by his parents and next friends Antonio G. Mauro & Doris L. Mauro, JEFFREY MAURO, ROBERT MAURO, A Minor, by his parents & next friends Antonio G & Doris L. Mauro, ASHLEY MAZZOLI, THOMAS G. MAZZOLI, BONNIE MAZZOLI, DEBORAH A. MCDONALD, RICHRD MCDONALD, ANTHONY NOLASCO, MARYOLAINE NOLASCO, DANIEL NOLASCO, A Minor, by his parents and next friends Anthony & Maylaine Nolasco, JOHN NOLASCO, A Minor, by his parents & next friends Anthony & Maryolaine Nolasco, NINO NOLASCO, A Minor, by his parents & next friends Anthony & Maryolaine Nolasco, RAYMOND J. POW, SUE HE POW, JONATHON PIERS POW, MATTHEW MARK POW, By his parents & next friends Raymond J. & Sun He Pow, SEAN RAYMOND POW, A Minor, by his parents & next friend Raymond J. Pow & Sun He Pow, THOMAS RICCI, PATRICIA RICCI, CHRISTINE RICCI, A Minor, by her parents and next friends Thomas Ricci & Patricia Ricci, REGINA RICCI, A Minor, by her parents & next friends Thomas Ricci and Patricia Ricci, ANNETTE ROSCA, ROCCO ROSCA, CAROLYN ROCCO ROSCA, MICHAEL ROSCA, A Minor, by his parents and next friends Annette & Rocco Rosca, ERIN SMITH, DENISE M. TOOHEY, JOHHN W. TOOHEY, JOHN TSHUMMI, ROSITA TSHUMMI, WAYNE N. WOODWORTH, RICKY WYLOT, JAMIE WYLOT, A Minor, by his parents & next friends Ricky Wylot & Nancy Wylot, JAMIE WYLOT, NICHOLAS WYLOT, A Minor, by his parents & next friends Ricky Wylot & Nancy Wylot, NEDRA ZISA, DAVIDT.ZISA, A Minor, by his parents & next friend Nedra W. Zisa, TIMOTHY R.E. KEENEY, in his Official Capacity, SIDNEY J. HOLBROOK, STECKER

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Petitioners, Marie G. Burnette and Ralph G. Burnette, Jr., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit was decided on September 13, 1999 (Appendix A) and is not published. The ruling of the district court can be found in Appendix C

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was decided on September 13, 1999. The Court of Appeals denied a timely petition for rehearing on July 18, 2000 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISONS INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Citizen suit provisions of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1365; Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6972; and the Comprehensive Environmental Response Compensation Liability Act ("CERCLA"), 42 U.S.C. § 9659. All three provisions contain essentially the same language. A copy of 42 U.S.C. § 6972 is provided in Appendix D.

STATEMENT OF THE CASE

The fundamental question in this case is whether a citizen plaintiff, acting as a private attorney general, has jurisdictional standing in federal court, under the citizen suit provisions of the Clean Water Act, RCRA and CERCLA when the defendant is a state that claims sovereign immunity pursuant to the Eleventh Amendment to the Constitution of the United States.

For an unknown period prior to 1989, the Connecticut Department of Correction, at its Osborne Correctional Facility in Somers, Connecticut was dumping potentially lethal hazardous wastes into drains and other receptors which migrated into the aquifer below. Families in homes south of the prison unknowingly drank water from the aquifer provided by their water wells. During this time, residents suffered numerous physical infirmities including severe and prolonged headaches, thyroid dysfunction, rapid heartbeat and numbness of the extremities.

In 1989, after several letters written by prisoner Gary W. Bornman to a local newspaper and to the Commissioner of the Connecticut Department of Environmental Protection, a partial investigation of waste handling was conducted finding that there was a dis-

charge of methylene chloride into the sanitary sewer system of the neighboring town of Enfield. However, state officials ignored the Mr. Bornman's request for a groundwater investigation even though Mr. Bornman had informed them that for ten to fifteen years previously, hazardous and other waste materials were discharged into the on-site sewage treatment system and seven dry drainage beds. Mr. Bornman expressed fear to DEP officials that the hazardous wastes were finding their way into the prison water supply.

In a letter to Department of Correction Commissioner Larry Meachum on April 26, 1989, Connecticut Department of Environmental Protection Commissioner Leslie Carothers acknowledged the storage of hazardous wastes but failed to enforce the provisions of 40 CFR § 262.34(b) which would require the prison to obtain a RCRA permit as a storage facility. Application for the RCRA permit would have required the prison to conduct ground-water monitoring and notify residents of ground water contamination. Residents unknowingly continued to drink the contaminated water for three to four years until the Town of Somers conducted water tests and found contamination in drinking water wells. During this time, the Connecticut Department of Environmental Protection was the enforcement agency for the Environmental Protection Agency. It continues to act in that capacity.

After serving proper notice and adhering to the required waiting period, the petitioners filed an environmental citizen suit on March 18, 1994 under the provisions of the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1365; Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6972 and the Comprehensive Environmental Response Compensation Liability Act ("CERCLA"), 42 U.S.C. § 9659 seeking declaratory and injunctive relief and award for litigation costs.

Approximately one year subsequent to the filing of the citizen suit, the State of Connecticut installed public water lines. Over a year after the filing of the petitioner's citizen suit, in a consent order between the Connecticut Department of Correction and the Connecticut Department of Environmental Protection determined a allocation of water that a resident could have free per month for a period of ten years. To get the free allocation of water, a resident was required to permanently seal their well. The State of Connecticut installed a number of monitoring wells and conducted a series of studies. No enforcement suit by the Environmental Protection Agency nor the Connecticut Department of Environmental Protection has ever been filed.

In a separate federal action, the petitioners and several of their neighbors filed a federal cost recovery lawsuit under CERCLA and a suit for damages in State court, which is still pending. Neither of these suits are subjects of this petition for writ of certiorari.

On May 4, 1998, the district court granted the defendant's motion for judgment on the pleadings and the petitioners filed a timely notice of appeal.

On September 13, 1999, the U.S. Court of Appeals for the Second Circuit affirmed the district court's ruling and denied the petitioners petition for rehearing on July 18, 2000.

Throughout the case, the petitioners have had water tests conducted that show a continuing discharge of hazardous wastes in excess of the allowable discharge limits determined by the Environmental Protection Agency.

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH ANOTHER U.S. COURT OF APPEALS RULING REGARDING THE STATUS OF PLAINTIFFS AS PRIVATE ATTORNEY GENERAL PURSUANT TO THE CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT.

Plaintiffs who have brought citizen suits under the Clean Water Act, RCRA and CERCLA against private polluters have been termed 'private attorneys general' and have been awarded litigation costs when they have been deemed a prevailing party. In *Armstrong v. Asarco, Inc.*, 138 F.3d 382, the court (U.S. Court of Appeals for the Eight District) affirmed the district court's award of litigation costs pursuant to 33 U.S.C. § 1365(d) up through June 30, 1995. In doing so, stated, "In our opinion, plaintiffs played the roles of catalyst and private attorney general, just as Congress envisioned, thereby successfully contributing to ASCARCO's remediation efforts and eventual settlement with the EPA." The court recognized that the private citizen-plaintiffs were playing an important enforcement role as Congress had envisioned.

The court below acknowledged that the Clean Water Act contains a provision to sue as private attorney general but then took a contradictory position when it stated that "The statutes at issue do not grant citizens the right to sue on behalf of the United States nor do they establish a formula for recovering civil penalties." It adds to the contradiction when it states that the "United States is not the real party in interest here." The citizen-suit provisions of the Clean Water Act and

RCRA expressly provide that the district court may impose civil penalties of up to $25,000 per day that are paid to the treasury of the United States. There is no provision for damages for the injured citizen-plaintiff.

The only significant difference between *Armstrong v. Asarco, Inc.* and this case is that the defendant is a state claiming sovereign immunity.

The petitioners have not been able to find a case wherein the plaintiff's status as a private attorney general has been determined by the status or class of the defendant.

II

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE COURT'S PRIOR RULING ON PRIVATE ENFORCEMENT OF AN IMPORTANT POLICY OF CONGRESS.

The petition for writ of certiorari should be granted because the opinion below conflicts with this Court's prior ruling on the ability of a private citizen to bring suit to enforce a policy that Congress has considered of the highest priority.

When Congress enacted 42 U.S.C. § 200a (the Civil Rights Act of 1964), it provided a provision for private enforcement of the act and provided for recovery of attorneys fees. In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the respondents owned a chain of drive-in restaurants that refused to serve African Americans. The Court acknowledged that enforcement of the Civil Rights Act of 1964 would prove difficult and that

the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. The Court clearly stated that "A Title II suit is thus private in form only" and determined that "When a plaintiff brings an action under that Title, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." The Court also recognized the importance of Congress' provision for the recovery of attorneys' fees to ensure that "aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."

The petitioners doubt that the Court and the courts below would have tempered their ardent rulings had the facilities been state libraries or parks and the state was the discriminator but claimed sovereign immunity as its sole defense. The plaintiffs would still be acting as 'private attorneys general', vindicating Congress' policy on racial discrimination with regard to public facilities.

Given the hypothesis that a state is not immune from federal enforcement of the Civil Rights Act of 1964, then how can it be immune to federal enforcement of laws prohibiting the dumping of potentially lethal hazardous wastes into the drinking water of private citizens? If a policy invoked by Congress to ensure that every citizen has a right to be served at a public facility is a "policy that Congress considered of the highest priority" then would not a policy designed, in part, to protect the very lives of citizens also be considered a policy of the "highest importance"?

CONCLUSION

The Court has determined that Congress has the power to use private enforcement to ensure compliance with important acts. The citizen suit provisions of the Clean Water Act, RCRA and CERCLA are private in form only. These private attorney general actions are designed to advance the public interest by ensuring broad compliance with federal law. If the Nation is the true beneficiary of the plaintiff's enforcement suit, then the United States is the real party in interest and there is no Eleventh Amendment bar to enforcement of its laws.

Accordingly, the petitioners request that their petition for writ of certiorari be granted.

Respectfully Submitted,

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MARIE BURNETTE and RALPH BURNETTE,

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LESLIE CAROTHERS, ENVIRONMENTAL PROTECTION DEPARTMENT OF CONNECTICUT, ARTHUR J. ROCQUE, JR., Commissioner Environmental Protection, LOWELL P. WEICKER, JR., Governor, BRUCE L. MORRIS, CT Dept. of Public Works, LARRY MEACHUM, Commissioner Official Capacity, CT Dept. of Correction, STATE OF CONNECTICUT, JOHN G. ROWLAND, Governor, THEODORE R. ANSON, Commissioner, JOHN J. ARMSTRONG, Commissioner,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: April 9, 1999 Decided: September 13, 1999)

Docket Nos. 98-7835(L), 98-9003(CON)

MARIE G. BURNETTE, RALPH G. BURNETTE, JR.,

Plaintiff-Appellants,

BRIAN E. BURNETTE, A Minor, by his parents and next friends, Ralph & Marie Burnette, *et al.*,

Plaintiffs,

v.

LESLIE CAROTHERS, ENVIRONMENTAL PROTECTION DEPARTMENT OF CONNECTICUT,

Consolidated-Defendants-Appellees,

ARTHUR J. ROCQUE, JR., Commissioner Environmental Protection, LOWELL P. WEICKER, JR., Governor, BRUCE L. MORRIS, CT Dept. of Public Works, LARRY MEACHUM, Commissioner Official Capacity, CT Dept. of Corrections, STATE OF CONNECTICUT, JOHN G. ROWLAND, Governor, THEODORE R. ANSON, Commissioner, JOHN J. ARMSTRONG, Commissioner,

Defendants-Appellees.

Before:

WINTER, Chief Judge,
NEWMAN, and SOTOMAYOR, Circuit Judges.

Appeal from a dismissal of a citizen enforcement action and from an adverse grant of summary judgment on a CERCLA claim by the United States District Court for the District of Connecticut (Ellen Bree Burns, Judge). We hold that appellants' citizen suit brought pursuant to the Clean Water Act, Resource Conservation and Recovery Act, and CERCLA as well as appellant's claim for response costs under CERCLA are barred by the Eleventh Amendment.

We therefore affirm.

RALPH G. BURNETTE, JR., and Marie G. Burnette, pro se, Somers, Connecticut, *for Plaintiffs - Appellants.*

ROBERT D. SNOOK, Assistant Attorney General

(Richard Blumenthal, Attorney General of Connecticut, of counsel), Hartford, Connecticut, *for Defendants-Appellees Lowell P. Weicker, Jr., Governor, Bruce L. Morris, CT Dept. of Public Works, Larry Meachum, Commissioner Official Capacity, CT Dept. of Corrections, State of Connecticut, John G. Rowland, Governor, Theodore R. Anson, Commissioner, John J. Armstrong, Commissioner.*ROBERT B. TEITELMAN, Assistant Attorney General (Richard Blumenthal, Attorney General of Connecticut, of counsel), Hartford, Connecticut, *for Defendants-Appellees Leslie Carothers, Environmental Protection Department of Connecticut, and Arthur J. Rocque, Jr., Commissioner Environmental Protection.*

WINTER, Chief Judge:

This is an appeal from the dismissal of a citizen enforcement action brought pursuant to the citizen suit provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9659, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). Because we agree with the district court that the Eleventh Amendment bars the relief sought by the citizen suit and the action for recovery of response costs, we affirm.[1]

Appellants, Marie G. Burnette and Ralph G. Bur-

[1] Throughout this opinion we refer to "Eleventh Amendment" state sovereign immunity. However, we recognize that this "phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999)

nette, Jr., appearing *pro se*, are homeowners in the Rye Hill section of Somers, Connecticut. They filed this action against various state officers in their official capacities, claiming that hazardous substances had emanated, and continued to emanate from the Connecticut Correctional Institute ("CCI"), a prison located north of Rye Hill and operated by the Connecticut Department of Corrections. Appellants alleged that these toxic substances had polluted and were continuing to pollute their on-site water wells. They sought injunctive and monetary relief.[2] In addition, they sought reimbursement from defendants for response costs which were alleged to have been incurred as a result of "a release or threatened release of hazardous substances" from CCI. See 42 U.S.C. § 9607(a) (4) (B). The complaint also included claims under CERCLA for a declaratory judgment, future response costs, and contribution, pursuant to 42 U.S.C. § 9613 (f) (1).

Arguing that the case was barred by the Eleventh Amendment, appellees moved to dismiss for lack of subject matter jurisdiction. They also moved for summary judgment on the claim for response costs, arguing that

[2] Sometime in 1993, water samples from wells in the Rye Hill area were found to contain certain chemicals in excess of standards for safe drinking water set by the State of Connecticut and the United States. The hazardous substances were found to be flowing from CCI, apparently as a result of previous disposal practices. Upon discovering the contamination, Connecticut officials immediately caused special filters to be installed in homes with high levels of the chemicals. The Department of Environmental Protection also began providing bottled water to the affected residents. A public water system was subsequently extended into the Rye Hill area, although not all of the homeowners chose to connect to it. The Department of Corrections, pursuant to a consent decree it entered into with the Department of Environmental Protection, ceased maintaining the filters after the public water system became operational.

the Eleventh Amendment prohibited recovery of monetary damages. The district court dismissed all claims, holding that the State and its agents were immune from suit under the Eleventh Amendment. In addition, the court granted appellees' motion for summary judgment, holding that appellants were not entitled to response costs from the State or to potential contribution costs because such recovery would violate the State's sovereign immunity. This appeal followed.

DISCUSSION

a) Citizen Suit

We review *de novo* a dismissal pursuant to Fed. R. Civ. P. 12 (c). *See Sheppard v. Beerman*, 18 F.3d 147,150 (2d Cir. 1994). In deciding a Rule 12 (c) motion, we apply the same standard as that applicable to a motion under Rule 12 (b) (6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. See id. We may dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In dismissing the action, the district court held that Congress did not, by authorizing environmental citizen suits, intend to abrogate the states' sovereign immunity. It also concluded that the State of Connecticut did not waive its sovereign immunity as to plaintiffs' CWA, RCRA, and CERCLA claims. We agree.

The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citi-

zens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. "While the Amendment by its terms does not bar suits against a State by its own citizens, [the Supreme] Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). State immunity extends to sate agencies and to state officers who act on behalf of the state. *See Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-147 (1993). Thus when the state is the real party in interest, the Eleventh Amendment generally bars federal court jurisdiction over an action against a state official acting in his or her official capacity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984).[3]

In certain circumstances, however, Congress may abrogate the states' constitutionally secured immunity from suit in federal court. To do so, Congress must make "'its intention unmistakably clear in the language of the statute.'" *Dellmuth v. Muth*, 491 U.S. 233, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Atascadero*, 473 U.S. at 246.

The CWA, RCRA, and CERCLA contain substan-

[3] An important exception to this general rule is set forth in *Ex Parte Young*, 209 U.S. 123 (1908), which holds that the Eleventh Amendment does not bar suits seeking prospective relief against state officials acting in violation of federal law because such action is not considered an action of the state.

tially identical provisions permitting citizens to sue as private attorneys general in circumstances where government authorities have, after notice, failed to take steps to remedy particular environmental harms. These provisions state that "any citizen may commence a civil action on his own behalf – (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency *to the extent permitted by the eleventh amendment to the Constitution*) who is alleged to be in violation of [the Act]." 33 U.S.C. § 1365(a) (1) (emphasis added); *see also* 42 U.S.C. § 6972; 42 U.S.C. § 9659. These provisions do not unequivocally express Congress's intent to abrogate sovereign immunity and subject states to suit. Far from evidencing a Congressional intent to do away with sovereign immunity, these provisions are expressly limited by the Eleventh Amendment. *See Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 423 (9th Cir. 1996) (district court properly dismissed all claims under CWA against state agency on Eleventh Amendment immunity ground); *Froebel v. Meyer*, 13 F. Supp. 2d 843, 849-50 (E.D. Wis. 1998) ("[T]he plainest meaning" of language in CWA is that "the Eleventh Amendment retains some presumptive force ..."); *Rowlands v. Pointe Mouillee Shooting Club*, 959 F. Supp. 422, 426 (E.D. Mich. 1997) (RCRA citizen suit provision operates within the Eleventh Amendment), *aff'd*, 182 F.3d 918 (6th Cir. 1999). The district court was, therefore, correct in holding that these citizen suit provisions do not abrogate Connecticut's sovereign immunity and that the state defendants are therefore entitled to immunity from suit in federal court.

Appellants assert, however, that even if a citizen suit would ordinarily be barred under the Eleventh Amendment, immunity does not apply here because the complaint is in the nature of a *qui tam* action and the

United States is the real party in interest. We disagree. In *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972), we held that "there is no common law right to maintain a *qui tam* action; authority must always be found in legislation...[T]he terms and structure of the particular statute are decisive." Id. at 84. The statutes at issue do not grant citizens the right to sue on behalf of the United States nor do they establish a formula for recovering civil penalties. To the contrary, the citizen suit provisions authorize "any citizen [to] commence a civil action on his own behalf." 33 U.S.C. § 1365(a) (emphasis added); see also 42 U.S.C. § 6972; 42 U.S.C. § 9659. The United States is not, therefore, the real party in interest here.

Appellants suggest on appeal that some of their claims remain viable because they fit within the exception to Eleventh Amendment immunity established by *Ex Parte Young*, 209 U.S. 123 (1908) (holding that suits against state officers, rather than against State itself, are permitted when seeking prospective relief). *See* Note 3, *supra*. However, appellants failed to raise this issue in the district court, even though they were then represented by counsel. Perceive that no miscarriage of justice will result, we hold that their claim under *Ex Parte Young* has been waived. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (noting that federal appellate courts may resolve issues not passed on below where injustice might otherwise result).

b) Recovery of Response Costs

Appellants next claim that they incurred costs in responding to the release of hazardous wastes from CCI and are therefore entitled to reimbursement from the State pursuant to 42 U.S.C. § 9607(a). Appellants also seek a declaratory judgment for future response costs

and contribution pursuant to 42 U.S.C. § 9613(f) (1).

We review the district court's grant of summary judgment *de novo*. *See Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir. 1998). In doing so, we construe the evidence in the light most favorable to the nonmoving party and drawall reasonable inferences in its favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Maquire v. Citicorp Retail Servs., Inc.*, 147 F.3d 232, 235 (2d Cir. 1998).

As an initial matter, claims made pursuant to CERCLA Section 113(f), 42 U.S.C. § 9613(f), are available only to a potentially responsible party seeking to recover from another potentially responsible party. *See Bedford Affiliates v. Sills*, 156 F.3d 416, 423-25 (2d Cir. 1998) (discussing differences between claims for recovery under 42 U.S.C. § 9607(a) and claims for contribution under 42 U.S.C. § 9613(f) and holding that a Section 9607(a) suit is not available to potentially responsible parties); H.R. Rep. No 99-253(I), at 79 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2861 (principal goal is passing CERCLA Section 113 was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances"). Because appellants to not claim to be a potentially responsible party, recovery under Section 113(f) is not available to them.

We turn therefore to their remaining claim for response costs under CERCLA Section 107(a), 42 U.S.C. § 9607(a). In *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996), the Supreme Court held that Congress may abrogate the states' sovereign immunity if two conditions are met: (i) Congress "unequivocally expresse[d] its intent to

abrogate the immunity" and (ii) Congress acted "pursuant to a valid exercise of power." (alteration in original) internal quotation marks omitted). In the instant case, the first requirement has been satisfied. In *Pennsylvania v. Union Gas Co.*, the Supreme Court held that the provisions of CERCLA unmistakably express Congress's intent to divest the states of their Eleventh Amendment immunity. See Union Gas, 491 U.S. 1, 8 (1989*), overruled on other grounds by Seminole*, 517 U.S. 44. The sole remaining question is, therefore, whether Congress enacted CERCLA pursuant to a constitutional provision granting Congress the power to abrogate. We hold that it did not.

The Supreme Court in *Seminole* held that Congress could abrogate the states' Eleventh Amendment immunity only when acting under the power vested in it by Section 5 of the Fourteenth Amendment. *See* 517 U.S. at 59, 65-66. CERCLA, however, was enacted pursuant to the Commerce Clause, and any provision in it that makes a state liable to private parties is accordingly unenforceable. *See Seminole*, 517 U.S. at 62 (implicitly recognizing that CERCLA was enacted pursuant to Commerce Clause); *Union Gas*, 491 U.S. at 19-23 (CERCLA enacted pursuant to Commerce Clause); *Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 962 F. Supp. 131, 135 (N.D. Ind. 1997) (holding that because Congress did not have power to abrogate immunity under Commerce Clause, unconsenting states are not liable to private parties under CERCLA); *United States v. Iron Mountain Mines, Inc.*, 952 F. Supp. 673, 675 (E.D. Cal. 1996) (CERCLA passed pursuant to Commerce Clause and thus Congress lacked power to abrogate immunity); *Prisco v. New York*, No. 91 Civ. 3990, 1996 WL 596546, at *12-*14 (S.D.N.Y. Oct. 16, 1996) (CERCLA claims dismissed because sovereign immunity could not be abrogated without action pursuant to Four-

teenth Amendment or state waiver and neither was present).

Appellants contend that CERCLA was also enacted pursuant to Congress's spending power under Article I, Section 8, Clause 1. Even if this were the case, however, Congress would still lack the power to abrogate the states' immunity. "[A]fter *Seminole*, Congress cannot abrogate the States' Eleventh Amendment sovereign immunity pursuant to any Article I power." *Close v. New York*, 125 F.3d 31, 38 (2d Cir 1997); *see also Florida Prepaid Postsecondary Educ. Expense Bd. V. College Sav. Bank*, 119 S. Ct. 2199, 2205 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers ..."); *cf. Alden*, 119 S. Ct. at 2246 (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts"). "[T]he only source of congressional abrogation stems from the Fourteenth amendment." *Close*, 125 F.3d at 38; *see also College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2224 (1999) (noting that Court has recognized individual suits against unconsenting states only when authorized by Congress's valid exercise of its Fourteenth Amendment enforcement power).

Alternatively, appellants maintain that by creating a claim for recovery of response costs, CERCLA created a property right and was therefore enacted pursuant to Congress's power under Section 5 of the Fourteenth Amendment. However, Congress's creation of a private claim for damages does not, without more, give rise to a legitimate claim of entitlement. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (finding that to have property interest, person "must have more than a

unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). To hold otherwise would eviscerate *Seminole*. Because we find that Congress's creation of CERCLA response-cost claims, standing alone, is insufficient to establish a cognizable property interest under the Fourteenth Amendment, we need to address "whether the prophylactic measure taken under purported authority of § 5 ... was genuinely necessary to prevent violation of the Fourteenth Amendment." *College Savings Bank*, 119 S. Ct. at 2225; *see generally City of Boerne v. Flores*, 521 U.S. 507 (1997).

Appellants also claim that although Connecticut did not expressly waive its Eleventh Amendment sovereign immunity, its actions may be construed as a constructive waiver. Relying on *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), they contend that Connecticut consented to suit in federal court under CERCLA by engaging in an activity regulated by Congress, namely the operation of a prison from which toxic chemicals were released. Parden, however, has now been expressly overruled. *See College Savings Bank*, 119 S. Ct. at 2228. Because the law is now clear that a state cannot "constructively waive[]" its sovereign immunity in the manner alleged, id., appellants' argument on this point fails.

Appellants finally argue that Connecticut consented to suit under CERCLA through the acceptance of federal monies. However "the mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero*, 473 U.S. at 246-47. Here, Congress did not manifest a clear intention to condition the receipt of federal funds under CERCLA on a state's waiver of Eleventh Amendment immunity. The district court was, therefore, correct in finding that

Connecticut did not consent to suit in federal court.

CONCLUSION

We therefore affirm.

APPENDIX B – RULING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FOR A PETITION FOR REHEARING FILED JULY 18, 2000

DCCT/NHCT
94cv420
Burns

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the

Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of July two thousand.

Marie G. Burnette, Ralph G. Burnette,. Jr.,
Plaintiff-Appellants,

v Dkt No: 98-7835

Weicker,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Marie G. Burnette and Ralph G. Burnette.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard-the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX C - RULING OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, MAY 4, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARIE G. BURNETTE, ET UX., : MASTER
: CONSOLIDATED
: CASE
Plaintiffs : 3:94-CV-00420 (EBB)

v.

JOHN G. ROWLAND, ET AL.,
Defendants

RALPH G. BURNETTE, JR.,
ET AL., : 3:94-CV-00676 (EBB)
Plaintiffs
v.

LARRY R. MEACHUM, ET AL.,
Defendants

RULING ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO ALL COUNTS OF PLAINTIFFS' CITIZEN SUIT, ACTION NO. 3:94-CV-00420 (EBB)

INTRODUCTION

This "Citizens Suit" Complaint is comprised of four counts filed against the State of Connecticut, the Governor of the State in his Official capacity, the Connecticut Department of Corrections, the Connecticut Department of Public Works, and their respective commissioners in their official capacities (the "State Defendants"). The four counts alleged are violations of: (1) the provisions of the Federal Water Pollution Control Act, commonly called the Clean Water Act ("CWA"), 33 U.S.C. § 1365; (2) and (3) the provisions of the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6972; and (4) the provisions of the Comprehensive Environmental Response Compensation Liability Act ("CERCLA"), 42 U.S.C. § 9659.

The State Defendants have moved, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, for judgment on the pleadings, dismissing all counts of the Citizen Suit, on the grounds that this Court lacks subject matter jurisdiction over the causes of action pleaded therein.

STATEMENT OF FACTS

The Court summarizes only those facts believed necessary to an understanding of the issues in, and the decision rendered on, this Motion.

The Citizen Suit Plaintiffs, the owners of thirty-seven (37) homes in the Rye Hill section of Somers, Connecticut, whose private on-site water wells are alleged to have been polluted with hazardous substances, have brought this action against the State and several of its officials. The Third Amended Complaint asserts that Plaintiffs' wells have been polluted by hazardous sub-

stances, namely certain dry-cleaning solvents, which have emanated, and continue to emanate, from the correctional facility at Somers, which facility abuts their properties.

Upon discovery, the State immediately took the lead in dealing with the groundwater pollution problem at Plaintiffs, residences. In this regard, the State, acting through the Department of Environmental Protection, began providing bottled water to the affected residents as soon as the well contamination problem was discovered. Thereafter, filters were installed on the affected wells to purify the well water until a permanent solution to the drinking water needs of the residents could be formulated and accomplished. The long-term solution to the drinking issue was to extend a public water system into the affected neighborhood and to connect the residences to this new system. All of these actions have been completed at the sole expense of the State, though some residents have refused to connect to the new public water system.

Furthermore, Defendant Connecticut Department of Corrections has entered into a consent order with the Connecticut Department of Environmental Protection covering the long-term remediation of the groundwater problem, including the monitoring, sampling and analysis of water.

LEGAL ANALYSIS

I. The Standard of Review

Rule 12 (c), Fed.R.Civ.P., provides in pertinent part:

> After the pleadings are closed but within

> such time as not to delay the trial, any party may move for judgment on the pleadings

Pursuant to Fed. R. Civ. P. 12(c), judgment on the pleadings may be granted when the material facts are undisputed and judgment on the merits is possible merely by considering the contents of the pleadings. *Seller v. M.C. Floor Crafter, Inc.*, 842 F.2d 639, 642 (2d Cir. 1988). In considering such a motion, the Court must accept as true all of the well-pleaded facts alleged in the Citizen Suit and may not dismiss the action unless the Court is convinced that the Citizen Suit Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *George C. Frey Ready-Mixed Concrete, Inc., v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir. 1977), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Accord Bloor v. Carr, Spanbock, Londin, Rodman & Pass*, 754 F2d 57, 61 (2d Cir. 1985); *LoSacco v. City of Middletown*, 745 F. Supp. 812, 814 (D.Conn. 1990)(dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim). Courts have said that they accept the truth of "facts" but not "legal conclusions." 5 C. Wright and A. Miller, *Federal Practice and Procedure*: Civil Section 1357 (1969).

II. The Standard As Applied

The CWA, RCRA and CERCLA each contain virtually identical pertinent provisions permitting citizens to sue as private attorneys general in situations where federal and/or state authorities have, after notice, failed to take action to remediate particular environmental

problems. These identical pertinent provisions provide that:

> "...any citizen may commence a civil action on his own behalf -(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the *extent permitted by the eleventh amendment to the Constitution...*"

33 U.S.C. § 1365(a); 42 U.S.C. § 6972(a); 42 U.S.C. § 9659 (emphasis added).

Congress' intent to abrogate the States' immunity from suit must be obvious from "a clear legislative 'statement", *Blatchford v. Native Villacte of Noatak*, 501 U.S. 775, 786 (1991). In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Supreme Court held that "[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246. See also *Blatchford*, 501 U.S. at 786, n. 4. Rather, as the Supreme Court wrote in *Dellmuth v. Muth*, 491 U.S. 223 (1989):

> "To temper Congress, authorized powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

Id. at 227-228.

The environmental citizen suit provisions at issue in this case do not equivocally express Congress' attempt to abrogate the Eleventh Amendment immunity. In fact, by their very terms, they operate within the Eleventh Amendment, specifically preserving it in the clearest possible terms. Abrogation of sovereign immunity is the antithesis, then, of the provisions of the present Citizen Suits brought against the State Defendants. *Rowland v. Points Mouillee Shooting Club*, 959 F. Supp. 422, 426 (E.D. Mich. 1997) (dismissing claim under RCRA based on preservation of sovereign immunity contained in the statute itself.)[1]

In addition, Congress would not have acted pursuant to a valid exercise of power, even if it had clearly intended to abrogate Congressional immunity. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Congress enacted RCRA and the CWA, along with CERCLA, pursuant to the Commerce Clause. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (CERCLA); *United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979) (CWA) ; *United States v. Rogers*, 6,85 F. Supp. 201, 203 (D. Minn.1987) (RCRA). Inasmuch as *Seminole* plainly rejected the Commerce Clause as a source of congressional power to waive sovereign immunity, for this reason, too, the Citizens Suits must fail.

Finally, it is also clear that the State of Connecticut did not waive its sovereign immunity as to these claims. The test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one." *Atascadero*, 373 U.S. at 241. In fact, the

[1] Plaintiffs have conceded that the *Rowland* decision is "clearly on point..." Letter from counsel to Citizen Suit Plaintiffs to Judge Thompson, July 21, 1997.

Citizen Suit Plaintiffs do not propound any such waiver in their pleadings or moving papers. In any event, the release of the polluting chemicals by the State at the Somers facility was plainly involuntary, and therefore could not possibly constitute the required knowing and deliberate waiver of its sovereign immunity.

CONCLUSION

Pursuant to Fed.R.Civ.P. 12(c), dismissal of a complaint is warranted when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim. After thorough research and the detailed analysis set forth herein, the Court is convinced that the Citizen Suit Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. Accordingly, Defendants' Motion for Judgment on the Pleadings as to All Counts of Plaintiff's Citizen Suit, No. 3:94-CV-00420 (EBB), [Doc. No. 114] is GRANTED.

SO ORDERED

/s/ ELLEN B. BURNS

ELLEN BREE BURNS,
SENIOR JUDGE
UNITED STATES DISTRICT COURT

Dated at New Haven, Connecticut this 4th day of May, 1998.

APPENDIX D - 42 USC § 6972

-CITE

42 USC Sec. 6972 01/06/97

-EXPCITE

TITLE 42 -THE PUBLIC HEALTH AND WELFARE
CHAPTER 82 -SOLID WASTE DISPOSAL
SUBCHAPTER VII -MISCELLANEOUS PROVISIONS

-HEAD

Sec. 6972. Citizen suits

-STATUTE

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf -

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal

facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragrh (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section -

(A) prior to 60 days after the plaintiff has given notice of the violation to -

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order. In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to -

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(3) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or

hazardous waste referred to in subsection (a)(1)(B) of this section, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment -

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9606), (FOOTNOTE 1)

(FOOTNOTE 1) So in original. The comma probably should be a semicolon.

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604);

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604) and is diligently proceeding with a remedial action under that Act (42 U.S.C. 9601 et seq.); or

(4) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Re-

sponse, Compensation and Liability Act of 980 (FOOTNOTE 2) (42 U.S.C. 9606) or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action. (FOOTNOTE 2) So in original. Probably should be 111980". In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment -

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604); or

(3) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9604) and is diligently proceeding with a remedial action under that Act (42 U.S.C. 9601 et seq.).

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a

hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other State relief (including relief against the Administrator or a agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a

published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

-SOURCE

(Pub. L. 89-272, title II, Sec. 7002, as added Pub. L. 94-580, Sec. 2, Oct. 21, 1976, 90 Stat. 2825; amended Pub. L. 95-609, Sec. 7(p), Nov. 8, 1978, 92 Stat. 3083; Pub. L. 98-616, title IV, Sec. 401, Nov. 8, 1984, 98 Stat. 3268.)